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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 11 July 2024
Pronounced on:15 July 2024

\+ O.M.P. (COMM) 239/2017

RELIANCE COMMUNICATIONS LIMITED .....Petitioner
Through: Mr. Abhimanyu Mahajan, Ms. Anwesha Padhi, Mr. Vipul Singh, Mr. Sushant Kandwal, Mr. Chaitanya Safaya, Ms. Anubha Goel and Mr. Mayank Joshi, Advocates.

versus

UNIQUE IDENTIFICATION AUTHORITY OF INDIA
....Respondent
Through: Mr. Purushottam Sharma Tripathi, Mr. Amit and Mr. Prakhar Singh, Advs.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

JUDGMENT

% 15.07.2024

1. This is a petition under Section 34[1] of the Arbitration and

[1] **34. Application for setting aside arbitral award**. –
(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).
(2) An arbitral award may be set aside by the Court only if—
(a) the party making the application establishes on the basis of the record of the arbitral tribunal that—
(i) a party was under some incapacity; or
(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or
(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:
Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

Conciliation Act 1996[2], assailing an award dated 23 February 2017 passed by a learned sole arbitrator.

2. Mr. Abhimanyu Mahajan, learned Counsel for the petitioner, has advanced only two grounds to challenge the impugned award. Neither, in my view, merits acceptance.

3. Given the limited nature of challenge no detailed allusion to facts is necessary. Suffice it to state that, the petitioner Reliance Communications Limited is a telecom service provider. The Central Government issued licenses to the petitioner under the proviso to Section 4 of the Indian Telegraph Act, 1885 authorising the petitioner to provide telecommunication services at various service areas of the country, as also national and international long distance services within India.

4. In December 2012, the respondent Unique Identification

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that —

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2. – For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

(2-A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the court, if the court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.

Authority of India[3], which issues a Unique Identification Number[4], also known as "Aadhaar", to all India residents, issued a Request For Proposal (RFP), calling on service providers to provide services of toll free number and allied services for contact centres of UIDAI. The bid of the petitioner was accepted by the respondent on 12 March 2013. A Standard Contract Form was executed between the petitioner and the respondent on 22 March 2013. In terms thereof, the petitioner started providing services to the respondent and raising monthly invoices on the respondent, based on its Call Detail Records. The Standard Contract Form also provided for resolution of disputes, were they to arise, by arbitration.

5. Alleging that the respondent had not paid the petitioner in accordance with the terms of the contract and had also made illegal deductions from the amount payable, the petitioner initiated arbitral proceedings, which have culminated in the impugned award dated 23 February 2017.

6. The petitioner assails the award.

7. With this brief background, one may straightway address the two grounds urged by Mr. Mahajan.

First ground of challenge – method of charging and payment

8. Submissions of Mr. Mahajan

[2] "the 1996 Act" hereinafter
[3] "UIDAI"

8.1 The first ground of challenge deals with the manner in which the petitioner was entitled to be paid by the respondent for the services provided by it. Mr. Mahajan has drawn my attention to Clauses 1 and 3.6.2 in part 2 (v) of the RFP which read thus:

> "PART-V: BID PREPARATION AND DOCUMENTS CHECKLIST:
>
> 1. FINANCIAL BID FORMS
>
> The bidder shall quote the cost per 'Connect Minute' for providing Toll Free Number and all other allied services related to TFN and short code 1947 as per the Scope of Work given in Section III which shall include all the statutory taxes, levies, duties etc. The above amounts quoted shall also be inclusive of all costs for providing other additional services specified in the 'Scope of Work'. The cost quoted shall be inclusive of all incidental expenses. The 'Cost' should also be inclusive of all taxes, such as but not limited to, VAT, Service Tax, duties, fees, levies, etc. on amounts payable by the Purchaser under the Contract."
>
> *****
>
> "3.6.2 CALL DETAIL REPORT: The selected service provider shall submit by the 10th business day of each month, a call detail report to the purchaser, which shall include the following for each call:
>
> Calling number
> Date and time
> Duration of call (minutes)
> Charge per call
> Subtotal by Toll Free Number
> Originating Number"

8.2 Additionally, Mr. Mahajan has drawn my attention to para 2 of LoI dated 12 March 2013 as well, which sets out the rate quoted by the petitioner while bidding for the contract, and reads thus:

[4] "UID"

"2. The rate quoted by the company is as under:

Total Cost Per Connect Minute for Toll Free Number and all allied services related to toll free number and short code 1947 that will be charged to UIDAI (inclusive of all statutory taxes and duties etc.) for the services required by the UIDAI

Pricing Component	Cost in INR (Two decimal places only) in words)	Cost in INR (Two decimal places only) (in numbers)
Charges per connect minute	Paise Sixty Five per connect minute	₹ 0.65 per connect minute"

8.3 Mr. Mahajan also refers to the following clauses of the Standard Contract Form finally executed between the parties.

"Standard Contract Form

THIS AGREEMENT is made on this 22nd day of March 2013 between Assistant Director General, of Unique Identification Authority of India (UIDAI) (hereinafter called the "Purchaser") which expression shall unless repugnant to the context thereof include his successors, heirs, assigns, of the one part, and Sanjay Mann, Senior Vice President of Reliance Communications Ltd. (hereinafter called the "Service Provider") which expression shall unless repugnant to the context thereof include his successors, heirs, assigns, of the other part.

WHEREAS the Purchaser had invited bids for certain Services, viz., "RFP for providing Toll Free Number and Allied Services" vide their bid document number F.No.14014/23/2012-Logistics dated December 2012.

AND WHEREAS various applications were received pursuant to the said bid.

AND WHEREAS the Purchaser has accepted a Bid by the Service Provider for the supply of those Services for the entire period of contract and call rate ₹ 0.65 per Connect Minute inclusive of all statutory taxes (hereinafter "the Contract Price")."

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> "3.4.2 CALL DETAIL REPORT: The selected service provider shall submit by the 10th business day of each month, a call detail report to the purchaser, which shall include the following for each call:
>
> Calling number
> Date and time
> Duration of call (minutes)
> Charge per call
> Subtotal by Toll Free Number
> Originating Number"

8.4 Precisely stated, the dispute between the petitioner and respondent insofar as the manner of billing is concerned, is this. The respondent has adopted a practice by which, at the end of the month, the total number of billed seconds is added up and first divided by 60, and the quotient is multiplied by ₹ 0.65. That amount is paid to the petitioner. The petitioner, on the other hand, contends that it is entitled to be paid for the number of minutes, *during any part of which* a call has been connected. The difference between these two methods of calculations may be explained thus.

8.5 If, for example, 5 calls are made in a month for durations of 20, 30, 40, 60 and 60 seconds, the respondent adds up these five figures, which works out to 210 seconds. This figure of 210 is then divided by 60, to work out the number of minutes (which works out to 3.5) for which the calls have been made. This figure of 3.5 is then multiplied by the contracted rate of ₹ 0.65 and payment made on that basis.

8.6 The petitioner's contention, *per contra*, is that it is entitled to be paid for these 5 calls treating them as a one minute call in each case. In other words, it would be entitled to be paid for 5 minutes, instead of

3.5 minutes. The payment would, therefore, be a product of 5 and 0.65 rather than a product of 3.5 and 0.65.

8.7 Mr. Mahajan has also invoked, in support of his challenge, Section 28(3)[5] of the 1996 Act. He submits that the said provision requires the learned Arbitrator to construe the contractual provisions in the light of established practice. The established practice, he submits, was to charge on "per second pulse rate" with the pulse rate fixed at 60 seconds. He has relied, in this context, on paras 9 to 12 of the Telecommunication Tariff (Fifty First Amendment) Order, 2012[6], dated 20 April 2012, issued by the Telecom Regulatory Authority of India[7]:

> "9. There have been demands from certain sections of Consumer Groups to reduce the number of tariff plans on offer with a view to avoid confusion and to facilitate informed choice. After consideration of all facts including the feedback from the consultation process, the Authority has decided not to interfere with the currently prevailing ceiling of 25 tariff plans that can be offered by a Service Provider at any given point of time. However, at the same time the Authority feels that there has to be at least one tariff plan each for both post-paid and pre-paid subscribers with uniform pulse rate i.e. 'per second pulse', across all service providers so as to enable the subscribers to compare the tariffs offered by different service providers.
>
> 10. The telecom market has witnessed intense price competition primarily due to entry of several new operators in the already competitive mobile telephony market. Substantially reduced call rates and innovative tariff schemes were triggered as part of attempts by new players to gain a foothold in the market. The mobile telephony market in the country being highly competitive, it was imperative for the incumbent operators to respond in equal measure in order to prevent erosion of their market share. The fear of large scale churn, particularly in the context of implementation of mobile number portability also

[5] (3) While deciding and making an award, the arbitral tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction.
[6] "the Telecom Tariff Order" hereinafter
[7] "TRAI"

> compelled the operators to come up with innovative and attractive tariff offers. Pulse rate for mobile calls had been generally 60 seconds, though there were isolated instances where few service providers implemented a different pulse rate. In the June, 2009, one of the new service providers, introduced 'per second billing', which was received favourably in the market. Within a period of few months, almost all mobile service providers introduced second based tariff plans for mobile subscribers in one form or other.
>
> 11. Scrutiny of tariff offers available in the market shows that almost all the service providers currently have 'per second billing' options made available to subscribers for making Local and STD calls. While several operators launched regular tariff plans having lifetime validity with one second pulse, some other service providers have implemented 'per second billing' option for a limited period through special tariff vouchers. There are also regular post-paid tariff plans with per second billing for most of the operators. It has been observed that 'per second billing' system is more acceptable among majority of the subscribers, because it enables the subscribers to pay only for the actual usage.
>
> 12. In order to ensure that 'per second billing' remains an assured alternative option for all subscribers, it has been decided to mandate that all service providers shall offer at least one pre-paid and one post-paid tariff plan with the pulse rate of one second for local and national long distance calls**.** The service providers will be at liberty to offer alternative tariff plans with any pulse rate within the overall ceiling of 25 tariff plans."

8.8 Mr. Mahajan has also pointed out that, in the next RFP, which was floated by the respondent, the term "connect minutes" was specifically defined thus:

> "(j). "Connect Minutes" is defined as aggregated connect minutes obtained after aggregating duration of individual calls (inbound/ outbound) in seconds divided by 60."

9. Findings of the learned Arbitrator

9.1 The learned sole Arbitrator has, on this issue, observed and held as under:

"In light of the above submissions made by both the Counsel, I am of the following view:-

The crux of the Claimant's case is that as per the prevailing industry practice the Claimant had been raising its invoices by calculating the *Connect Minutes* on a call-by-call basis, however, the Respondent had unilaterally decided to pay the Claimant on the basis of aggregate minutes by taking call duration of each call received in a month and dividing the same by 60. The Claimant relied on ***Bank of India v. K. Mohandas***[8], to contend that since the contract was drafted by the Respondent, any ambiguity must be construed against the Respondent. The relevant portion of the said Supreme Court judgment reads a under:-

> "It is also a well-recognized principle of construction of a contract that it must be read as a whole in order to ascertain the true meaning of its several Clauses and the words of each Clause should be interpreted so as to bring them into harmony with the other provisions if that interpretation does no violence to the meaning of which they are naturally susceptible".

As per Clause 3.4.2 of the Agreement between the parties, the Respondent had to pay the Claimant a sum of Rs. 0.65 per connect minute. The Clause reads as under:-

> Clause 3.4.2- "Call detail report- the selected service provider shall submit by the 10th business day of each month, a call detail report to the purchaser, which shall include the following for each call:
>
> calling number
> date and time
> duration of call (minutes)
> charge per call
> subtotal by toll free number
> originating number"

The contract provided that the billings were to be on the basis of duration of calls (minutes). The very fact that the contract further provided for charge per call made it evident that the duration of call, which could be both in minutes and/or seconds was a relevant factor. A fraction of a minute is expressed in seconds. The phrase *'Charge per call'* only refers to the duration of the call and cannot be construed as call per unit. *'Charge per call'* refers to the

[8] **(2009) 5 SCC 313**

duration of call which could be both in minutes and/or seconds. The Claimant's contention would have been sustainable if the contract provided that the billing was to be on the number of calls. Therefore, the plea of the Claimant that the invoices were raised as per the prevailing industry practice has no merit in view of the specific provisions of the contract. Similarly, the incorporation of the charge per second in the future contracts only clarifies the stand of the Respondent and does not alter the effect to be given to the present contract. The plea of industry practice is not relevant as the contract between the parties makes it quite clear that a call detail report includes duration of call in minutes and charge per call. Thus, I see no miscalculation in the procedure adopted by the Respondent. Similarly, the decision in ***Bank of India v. K. Mohandas***, would have been relevant had there any ambiguity in the contract but I do not find any ambiguity.

The Claimant had no doubt addressed various letters/correspondences dated 19.11.2013, 06.12.2013, 10.01.2014, 05.02.2014, 24.02.2014, 05.03.2014, 11.03.2014, 14.03.2014, 25.03.2014, 26.03.2014, 03.04.2014 and 04.04.2014 to the Respondent requesting the Respondent to release the payments withheld by them on the basis of aggregating call durations. The Claimant should have sought clarifications regarding the perceived ambiguity about the 'per connect minute' issue, before entering into the contract as provided in the pre-tender process. This not having been done, the Claimant's plea cannot be accepted. Thus, the stance of the Respondent is correct.

As per the terms of the contract, the Respondent had the option of extending the contract for a period of one year or part thereof, subject to satisfactory performance of the Claimant. It is important to note here that the Claimant by a letter dated 23.11.2015 stated that they agree to extend the services for a period of 1 year after the expiry of the existing contract on the same terms and conditions as were specified in the present contract. A bare perusal of the letter makes it amply clear that the Claimant did agree to the terms and conditions of the Respondent. The contract was indeed extended by a period of 6 months or till a new service provider was selected. The said letter by the Claimant is nothing but a deemed acceptance by them of the then prevailing practice of aggregate summing up of duration of calls by the Respondent because at the time of extension their grievance about their claim based on per call basis had already been made by several mails/letters as pointed out above and it would have been the most obvious issue to be raised with the Respondent at the time of the one year extension sought by the said letter dated 23.11.2015. This not having been done by the Claimant, makes it evident that the Claimant had accepted the method of billing on the basis of aggregating the total calls in

> minutes adopted by the Respondent. Inspite of its earlier mails claiming payment on the basis of per unit, the Claimant agreed to a contract which was being interpreted by the Respondent on per minute and not per call basis. The acceptance of the plea of the Claimant would tantamount to substituting the terms of the contract. Thus, the claim of the Claimant regarding the claim on the basis of per call unit is unsustainable and is rejected."

10. Analysis

10.1 Clearly, the grievance of the petitioner centres entirely on the interpretation of the afore-extracted clauses of the Standard Contract Form dated 22 March 2013, seen in the light of the clauses of the RFP and the LoI which preceded the contract.

10.2 The dispute, therefore, is entirely within the realm of interpretation of contract. There is a plenitude of authorities to the effect that the High Court, in exercise of its jurisdiction under Section 34 of the 1996 Act, does not interfere with the manner in which the learned Arbitral Tribunal interprets contractual covenants, unless the interpretation is clearly contrary to the contract itself, to the extent that it amounts to re-writing the contract, or is contrary to other provisions of the contract. Else, the Arbitral Tribunal is the final arbiter of the manner in which the contract before it has to be interpreted. One may refer, in this context, to ***Hindustan Construction Company Ltd v. N.H.A.I.***[9], ***N.H.A.I. v. Hindustan Construction Co. Ltd***[10], ***Reliance Infrastructure Ltd v. State of Goa***[11] and ***Konkan Railway Corporation Ltd v. Chenab Bridge Project Undertaking***[12].

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[9] **(2024) 2 SCC 613**
[10] **2024 SCC OnLine SC 802**
[11] **(2024) 1 SCC 479**
[12] **(2023) 9 SCC 85**

10.3 In the present case, however, one need not go as far as to invoke this general principle as, howsoever expansive the jurisdiction of this Court under Section 34 of the 1996 Act may be deemed to be, there is no scope for interpretation with the findings of the learned Arbitrator, insofar as the manner in which the petitioner was to be billed is concerned. Indeed, the interpretation advanced by the learned Arbitrator is the only reasonable interpretation that can be extended to the contractual covenants. Not only is it reasonable, it is in sync with the contractual clauses, whereas the submissions advanced by Mr. Mahajan would actually militate against the contract.

10.4 The rate specified in the contract was on per contract minute basis. To apply this formula, one has, therefore, to ascertain the number of minutes for which the call took place. *There is no provision in any of the contractual documents, including the LoI, RFP and the Standard Contract Form dated 22 March 2013, which entitles the petitioner to be paid for a whole minute, even if the call was only for part thereof.* The respondent, therefore, correctly divided the total number of seconds for which the calls took place by 60 which worked out the number of called minutes. The rates of ₹ 0.65 stipulated in the LoI was on "per connect minute" basis. The number of minutes for which the call was connected had, therefore, necessarily to be ascertained. In a case where, therefore, total number of call seconds was 210 (refer the example in para 8.5 *supra*), the number of call minutes would be 3.5. The petitioner would, therefore, be entitled to be paid for 3.5 minutes @ ₹ 0.65 per minute.

10.5 This is the only way in which the formula contained in the LoI read with the covenants of the contract in the RFP could be implemented.

10.6 If Mr. Mahajan's contentions were to be accepted, then, though the total number of called seconds were 210, working out to 3.5 call minutes, the petitioner would be entitled to bill for 5 call minutes. This would be clearly contrary to the formula of ₹ 0.65 per connect minute provided in the LoI.

10.7 Mr. Purushottam Sharma Tripathi, learned Counsel for the respondent, also emphasised the word "connect" in the formula contained in the LoI, and I think he is right in doing so. The rate prescribed is ₹ 0.65 per connect minute, and not ₹ 0.65 per minute. Mr. Tripathi submits that a "connect minute" can only be that part of the minute for which connection was on. If the connection was, therefore, for half a minute, the billing could not be for one full minute.

10.8 Though the learned Arbitrator has not proceeded on this ground, the submission, nonetheless, has merit. The use of the word "connect" cannot be treated as a mere superfluity, as commercial contracts are expected to be carefully drafted, without any superfluous expressions. The use of the word "connect" would, therefore, support the interpretation adopted by the learned Arbitrator, to the effect that the actual number of minutes – which would include a part of the minute, where the connection was on, and not for a whole minute – would

have to be ascertained before applying the multiplier of ₹ 0.65. This could only be done by dividing the total number of called seconds by 60.

10.9 I, therefore, entirely concur with the manner in which the learned Arbitrator has computed the amount to which the petitioner was entitled.

10.10 The learned Arbitrator has also adverted to Section 28(3) of the 1996 Act. He has found that, as the interpretation of the contract was clear and unambiguous, there was no occasion to take recourse to Section 28(3).

10.11 I am in agreement with the learned Arbitrator on this score as well. Where the contractual covenants unambiguously indicate one way, no real occasion arises for the learned Arbitral Tribunal to rule the other, by recourse to practices in the trade. All that Section 28(3) requires the learned Arbitral Tribunal to do is to *take into account* the *terms of the contract and trade usages*. Importantly, the expression "terms of the contract" precedes "trade usages". What the learned Arbitral Tribunal has primarily to take into account is, therefore, the terms of the contract. Where the contractual terms are clear, no occasion arises for the learned Arbitral Tribunal to advert to trade usages.

10.12 Even otherwise, it is trite that parties are bound by the terms of the contract executed between them, especially where the contract is commercial in nature. No escape, from the contractual covenants, is

permissible on the basis of trade usage.

10.13 The telecom tariff, on which Mr. Mahajan relies, pertains to the tariff charged from consumers, and has nothing to do with the rate at which the petitioner was entitled to bill the respondent. The petitioner has not, therefore, even been able to make out a case of commercial practice, to support its claim for being paid for a whole minute even if the call lasts only for a part of it.

10.14 Similarly, the reliance, by the petitioner, on the next RFP dated 9 February 2016 issued by the respondent – with which the petitioner is actually not concerned, and in response to which the petitioner actually never bid – militates against the petitioner's arguments, rather than support it. In the said RFP, the respondent has clarified what "connect minutes" means. The expression is defined as the aggregated connect minutes obtained after aggregating the duration of all individual calls *in seconds divided by 60*. Though this definition does not find place in the RFP dated December 2012, in response to which the petitioner bid, there is no reason why the court should assume that the respondent adopted a new method of billing in the subsequent RFP dated 9 February 2016, different from the method of billing applicable to the RFP dated December 2012, or that the expression "connect minutes" in the two RFPs should be interpreted differently. The definition of "connect minutes" as contained in the RFP dated 9 February 2016, may, therefore, be also be regarded as clarificatory of the manner in which the expression "connect minutes" is to be understood in the case of the RFP dated December 2012 and LoI dated 12 March 2013, which apply to the petitioner.

10.15 The learned Arbitrator must, therefore, have been held to have correctly upheld the decision of the respondent to divide the total number of seconds for which calls were made by 60 so as to arrive at the number of called minutes. The stipulated rate of ₹ 0.65 was on per connect minute basis. If the connection was, therefore, for a fraction of a minute, the rate would have to be applied to that fraction. There is no justification, in the contact, for rounding off the called duration to the next whole minute. The multiplier of ₹ 0.65 would have to be applied to the fraction of the minute for which the call went through and took place. It cannot be applied to a whole minute, if the call did not last for a full minute.

10.16 Even on facts, therefore, I am of the opinion that the petitioner has not made out a case justifying invocation of Section 28(3) of the 1996 Act.

10.17 The first ground of challenge, by the petitioner, to the impugned award, therefore, fails.

Second ground of challenge – SLA deductions

11. The second ground of challenge relates to certain deductions by the respondent from the billed amounts, under the Service Level Agreement[13] which is part of the Standard Contract Form executed between the petitioner and the respondent. The respondent made certain deductions from the petitioner invoices on the ground that the

petitioner had failed to meet its average monthly network availability target of 99.95%.

12. The case of the petitioner was that the agreement required the respondent to provide data centre and disaster recovery topologies, which were not provided. Had these been provided, the petitioner's contention was that it would have met the target of 99.95%.

13. The merits of this contention of the petitioner need not be examined, as the learned arbitral tribunal, too, did not do so.

14. The petitioner, however, also raised an issue of violation of the principles of natural justice, and further contended that the respondent could not have made the deductions without a prior show cause notice to the petitioner.

15. Decision of the learned Arbitrator: The learned Arbitrator found merit in the petitioner's contention that the impugned decision to effect deductions from the petitioner's bill could not have been made without a prior show cause notice and due compliance with the principles of natural justice. The learned Arbitrator, therefore, remanded the matter to the respondent to issue a show cause notice and reconsider the matter in due compliance with the principles of natural justice.

16. Petitioner's contention: Mr. Mahajan sought to contend that the learned arbitrator could not have remanded the matter. He, in fact,

sought to urge that the learned arbitrator has no power of remand. He places reliance, in this context, on the judgment of a Division Bench of the High Court of Madhya Pradesh in ***Gulab Bai v. NHAI***[14], the judgment of a learned Single Judge of the High Court of Punjab and Haryana in ***UOI v. Atma Singh***[15] and the judgment of this Bench in ***GMR Hyderabad Vijayawada Expressways Pvt Ltd v. NHAI***[16], which was subsequently upheld in appeal by a Division Bench.

17. Analysis

17.1 None of these decisions, in my view, support the contentions that the learned Arbitral Tribunal has no power of remand.

17.2 The decision in ***Gulab Bai*** was based specifically on arbitral proceedings under Section 3(G)(5) of the National Highway Act, 1956. The nature of the said provisions has not been pointed out to this Court. It is not known whether the said provisions contained any proscription against remand.

17.3 That apart, the fact situation which obtained before the Division Bench of the Madhya Pradesh High Court was clearly distinguishable. In that case, the arbitral proceedings were with respect to a claim for enhancement of compensation by landowners whose land had been acquired. The learned Arbitral Tribunal remanded the matter to the departmental authorities for computing the compensation payable. It was in these circumstances that the Division Bench of the High Court

[14] **2017 SCC OnLIne MP 420**
[15] **2013 SCC OnLine P&H 598**

held that the remand of quantification of the compensation itself to the respondent was not justified. As against this, in the present case, the remand is precisely for ascertaining the justification for the deductions effected by the respondent from the petitioner's bills, which was the specific challenge raised by the petitioner.

17.4 ***Gulab Bai*** is, therefore, clearly distinguishable.

17.5 ***Atma Singh*** dealt with the power of the Court under Section 34 of the 1996 Act to remand the matter to the arbitrator, and not with the power of the arbitrator to remand the matter to the original authority. The decision, therefore, has no application.

17.6 ***GMR*** was not a case of remand on the ground of violation of the principles of natural justice. This Court had, before it, in that case, a majority award and a minority award. *Both the awards upheld the discretion of the arbitrator to remand the matter*. The difference was that the majority award remanded the matter to the respondent, whereas the minority award was of the view that, as the respondent was an interested party, the case ought not to have remanded to it. In agreeing with the minority award, this Court was also influenced by the extent to which GMR's case was contested by the respondent. In these circumstances, this Court held that remanding the matter to GMR, once it had taken a decision on merits and defended it, before this Court tooth and nail, would be futile.

17.7 None of these judgments, therefore, hold, as a proposition of

law, that an Arbitral Tribunal has no power to remand a matter.

17.8 Once this position is understood, the decision on whether to remand, or not, is purely one of discretion.

17.9 Such a discretionary decision cannot brook interference under Section 34 of the 1996 Act. The scope of interference with arbitral awards under the said provision is now heavily circumscribed. It is only in a case in which the award is vitiated for one or more of the reasons envisaged by the Section, that the Court can step in. Sub-Sections (2) and (2A) are exhaustive of the circumstances in which an arbitral award can be set aside. That the circumstances envisaged in Section 34(2) are exhaustive is clear from the use of the word "only if" in Section 34(2). Under Section 34(2), an arbitral award can be set aside *only if* the applicant establishes that it was under some incapacity; or that the arbitration agreement is not valid; or that the applicant was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings; or that the applicant was otherwise unable to present his case; or that the award dealt with a dispute not falling within the terms of submission to arbitration or dealt with matters beyond the scope of submission to arbitration; or that the composition of the arbitral tribunal was not in accordance with the agreement of the parties; or that the subject matter of the dispute was not arbitrable; or that the arbitral award was in conflict with the public policy of India. The expression "public policy of India" is nebulous, but the legislature has cleared the air, somewhat, by Explanation 1 to Section 34(2) which sets out, in clauses (i) to (iii), the *only* circumstances in which an award could be said to be in

conflict with the public policy of India. These are, if the making of the award was tainted by fraud or corruption, or if the award breached confidentiality, or if the award was in conflict with Section 81 of the 1996 Act.

17.10 Section 34(2) further permits the setting aside of an arbitral award if the award is vitiated by patent illegality appearing on the face of the award.

17.11 The contours of the expression "patent illegality" have been authoritatively delineated by the Supreme Court, in paras 43 to 45 of ***PSA SICAL Terminals (P) Ltd v. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin***[17]:

> "43. It will thus appear to be a more than settled legal position, that in an application under Section 34, the court is not expected to act as an appellate court and reappreciate the evidence. The scope of interference would be limited to grounds provided under Section 34 of the Arbitration Act. The interference would be so warranted when the award is in violation of "public policy of India", which has been held to mean "the fundamental policy of Indian law". A judicial intervention on account of interfering on the merits of the award would not be permissible. However, the principles of natural justice as contained in Section 18 and 34(2)(a)(iii) of the Arbitration Act would continue to be the grounds of challenge of an award. The ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the "most basic notions of morality or justice". It is only such arbitral awards that shock the conscience of the court, that can be set aside on the said ground. An award would be set aside on the ground of patent illegality appearing on the face of the award and as such, which goes to the roots of the matter. However, an illegality with regard to a mere erroneous application of law would not be a ground for interference. Equally, reappreciation of evidence would not be permissible on the ground of patent illegality appearing on the face of the award.

[17] **2021 SCC OnLine SC 508**

44. A decision which is perverse, though would not be a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. However, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality.

45. To understand the test of perversity, it will also be appropriate to refer to paragraph 31 and 32 from the judgment of this Court in ***Associate Builders v. DDA***[18], which read thus:

> "31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:
>
> (i) a finding is based on no evidence, or
>
> (ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or
>
> (iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.
>
> 32. A good working test of perversity is contained in two judgments. In ***Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons***[19], it was held:
>
> > "7. … It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law."
>
> In ***Kuldeep Singh v. Commr. of Police***[20], it was held:
>
> "10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it

[18] **(2015) 3 SCC 49**
[19] **1992 Supp (2) SCC 312**
[20] **(1999) 2 SCC 10**

> may be, the conclusions would not be treated as perverse and the findings would not be interfered with." "

17.12 There is no need to subject the impugned award, insofar as it remands the issue of SLA deductions to the respondent for *de novo* consideration, to any kind of searching scrutiny, predicated on the above principles. The learned Arbitrator has not dealt with the issue on merits, but has chosen to remand it for a fresh consideration, holding that the decision had necessarily to be preceded by a show cause notice and compliance with the principles of natural justice, which had not been done. This decision was in fact rendered *ad invitum*, as the plea of violation of the principles of natural justice was specifically urged by the petitioner before the learned arbitrator. Having urged the ground, the petitioner cannot, quite obviously, complain that the ground was accepted by the learned arbitrator, or that, having accepted it, the learned arbitrator ought to have granted the petitioner's claim, instead of remanding the matter. Once the arbitrator had found the plea of absence of a show cause notice and failure to comply with natural justice to be substantial, the consequential order which was to be passed was entirely within the realm of the arbitrator. Indeed, ordinarily, once a plea of violation of principles of natural justice is accepted by a judicial authority, the sequitur that follows is that the matter is directed to be considered *de novo* in compliance with the principles of natural justice.

17.13 That is all that the learned arbitrator has done.

17.14 In view of the fact that the learned arbitrator was not denuded of

the power to remand the matter, the decision to remand becomes purely discretionary. It cannot be said – and indeed it was not even contended – that the exercise of discretion was perverse or arbitrary. That being so, no question of interference with the decision, within the parameters of Section 34 of the 1996 Act can be said to arise.

Conclusion

18. For all the above reasons, the two grounds on which alone Mr. Mahajan has assailed the impugned award dated 23 February 2017, passed by the learned arbitrator, are found to be devoid of merit. The challenge to the impugned award, therefore, fails. The impugned award of the learned Arbitrator is upheld in its entirety.

19. The petition is accordingly dismissed with no orders as to costs.

C.HARI SHANKAR, J

JULY 15, 2024/*dsn/yg*

Click here to check corrigendum, if any